S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of John A. Holeton against DTE Energy Company.	)))	Case No. U-17986

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on September 16, 2016.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 4300 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before October 14, 2016, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before November 4, 2016.

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Sharon L. Feldman

Sharon L. Feldman
Administrative Law Judge

September 16, 2016
Lansing, Michigan

S T A T E O F M I C H I G A N

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of John A. Holeton against DTE Energy Company.	)))	Case No. U-17986

PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

John A. Holeton filed a complaint on February 22, 2016 against DTE Energy Company and its electric utility subsidiary, DTE Electric ("DTE"), [1] invoking the Commission's jurisdiction under MCL 460.58. Mr. Holeton and his wife, Pauline Holeton, have lived at their present address in Shelby Township for over 30 years. Ms. Holeton is DTE's customer of record at this address. Mr. Holeton's complaint arises from DTE's efforts to replace analog meters with Advanced Metering Infrastructure (AMI) meters in the Holetons' house and in their neighborhood beginning in November 2015. As described below in section I, a hearing was held on the complaint on June 28, 2016. This Proposal for Decision (PFD) addresses the legal and factual disputes resulting from that hearing.

[1] DTE Electric is clearly the intended respondent.

II.

PROCEDURAL HISTORY

In the discussion that follows, section A reviews Mr. Holeton's complaint, section B reviews DTE's answer, section C reviews Staff's motion for summary disposition, sections D and E review the responses to that motion, section F reviews oral argument on the motion, and section G reviews the evidentiary record. Section H reviews the parties' concluding arguments.

A. Complaint

Mr. Holeton's complaint alleged generally that DTE's meter replacement program is unlawful, and alleged that DTE violated specific Commission rules in attempting to replace the Holetons' meter specifically.

Describing the events that took place on November 20, 2015, the complaint alleged that on that date, DTE employees arrived at the Holetons' house and asked to replace the meter, further alleging that Mr. Holeton told them that replacing the meter with an AMI meter would be unlawful. The complaint alleged that DTE's representative also objected to locks on the Holetons' meter, and alleged that the locks do not pose a safety concern. The complaint also stated that DTE did not change the meter that day, but left a pamphlet regarding DTE's AMI opt-out program.

The complaint alleged that DTE subsequently violated several of the Commission's Consumer and Billing Practice Rules, R 460.101 et seq., including R 460.131 (Publication of Procedures), R 460.137 (Shutoff Permitted), R 460.139 (Form of Notice), and R 460.115 (Customer Meter Reading). The complaint alleged that DTE sent a shutoff notice

that did not contain the information required by R 460.139 (g), (h), and (i),[2] and did not otherwise provide this information as required by R 460.131. The complaint alleged that DTE thus interfered with the Holetons ability to seek protection from the Commission by filing a complaint, which the complaint characterizes as a due process claim. The complaint also alleged that DTE is wrongly claiming that a shutoff of the Holetons' service is permitted under R 460.137(e),[3] because the Holetons have not refused DTE access to the meter, and wrongly claiming a shutoff is permitted under R 460.137(g),[4] because there is no safety concern with locks the Holetons have placed on their meter. The complaint also cited R 460.115[5] in connection with R 460.137(e), alleging that DTE cannot cite a denial of access to read the meter as a basis for a shutoff under R 460.137(e) because the Holetons have been submitting meter readings to DTE under R 460.115.

[2] "A notice of shutoff of service shall contain all of the following information: . . .

(g) That the customer has the right to represent himself or herself, to be represented by counsel, or to be assisted by other persons of his or her choice in the complaint process.

(h) That the utility will not shut off service pending the resolution of a complaint that is filed with the utility or the commission in accordance with these rules.

(i)The telephone number and address of the utility where the customer may make inquiry, enter into a settlement agreement, or file a complaint."

[3] "Subject to the requirements of these rules, a utility may shut off or terminate service to a residential customer for any of the following reasons: . . . (e) The customer has refused to arrange access at reasonable times for the purpose of inspection, meter reading, maintenance, or replacement of equipment that is installed upon the premises, or for the removal of a meter."

[4] "Subject to the requirements of these rules, a utility may shut off or terminate service to a residential customer for any of the following reasons: . . . (g) The customer has violated any rules of the utility approved by the commission so as to adversely affect the safety of the customer or other persons or the integrity of the utility system."

[5] "A utility shall provide each customer with the opportunity to read and report energy usage provided the customer accurately reports energy usage on a regular basis. A utility shall provide postage-paid, pre-addressed postcards for this purpose upon request, or the utility may permit customers to report meter readings on a secure company website, by telephone, or other reasonable means. At least once every 12 months, a utility shall obtain an actual meter reading of energy usage to verify the accuracy of readings reported in this manner. Notwithstanding the provisions of this rule, a utility company representative may read meters on a regular basis."

The complaint further alleged that DTE's installation of an AMI meter without the Holetons' consent is unlawful. In support of this claim, the complaint cited a provision of the Michigan Penal Code, MCL 750.539d,[6] and included as an attachment a copy of a February 11, 2016 letter to Attorney General Bill Schuette from Hon. Peter J. Ludio, State Representative, seeking a formal opinion regarding the applicability of this statutory provision to AMI meters. The complaint also cited the 2005 Energy Act, Public Law 109-58-Aug. 8, 2005, section 1252.[7] The cited provisions of this statute amend provisions of the Public Utility Regulatory Policy Act of 1978, specifically 16 USC §§ 2621, 2625, and 2642, to expressly address the use of time-based rates. The complaint asserted that this provision of federal law gives customers a choice whether to accept a smart meter. And the complaint cited a provision of the Michigan Consumers Protection Act, MCL 445.903(1)(h).[8] The complaint further stated: "Entering a settlement of continuing service as originally contracted, and self-reading of meters under R 460.115 will eliminate any conflict and is reasonable and prudent for all parties involved."[9]

---

[6] See Complaint, page 2, paragraph 3a. MCL 750.539d states in part:

> "(1) Except as otherwise provided in this section, a person shall not do either of the following:
> (a) Install, place, or use in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place."

[7] See page 3, paragraph 3.

[8] See page 3, paragraph 4. MCL 455.993(1)(j), (k), (m), and (n) state:

> "(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
> * * *
> (j) Representing that a part, replacement, or repair service is needed when it is not.
> (k) Representing to a party to whom goods or services are supplied that the goods or services are being supplied in response to a request made by or on behalf of the party, when they are not.
> * * *
> (m) Causing a probability of confusion or of misunderstanding with respect to the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction.
> (n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction."

[9] See Complaint, page 4, paragraph 6.

Under the heading “Remedy Requested”, the complaint requested that shutoff be prohibited, that DTE be directed to cease installation of AMI meters generally, and to document the safety of AMI meters. The complaint further asked the Commission to require DTE employees seeking access to the Holetons’ property for non-emergency purposes to identify themselves, citing R 460.141,[10] and give contact information for complaints, citing R 460.131.

The complaint contained three attachments in addition to the Attorney General opinion request noted above: a “durable power of attorney” from Ms. Holeton, acknowledging that she is the account holder with DTE and stating that Mr. Holeton has her permission to bring the complaint; emails to show the Holetons have been providing DTE with meter readings as permitted by R 460.115; and two photos taken November 20, 2015.

B. Answer

DTE filed a timely answer to the complaint on May 9, 2016. In its answer, DTE denied that it violated any of the applicable Commission rules in its dealings with the Holetons. DTE stated that it did not shut off service to the Holetons’ home, and denies that it sent a shutoff notice. DTE’s answer stated that instead, it sent a letter to Ms. Holeton asking her to contact the company because the company’s field representative could not gain access to replace the analog meter with an AMI meter.

DTE further denied that Mr. Holeton is “the customer” of DTE at his home address because Ms. Holeton is the customer of record. DTE in a footnote further stated:

[10] This rule applies to the utility’s obligation to have an employee identify himself or herself to the customer or other responsible person at the premises, immediately prior to shutting off the service.

> Complainant apparently seeks to represent Pauline Holeton in this case, as indicated by a Limited Durable Power of Attorney attached as Exhibit 3 to the complaint. The document speaks for itself, and under its own terms may be revoked "at any time." Representation is allowable under some circumstances. See generally, Mich Admin Rule 792.10107. DTE Electric will be prepared to proceed with the scheduled hearing, and reserves all rights to object to the validity and scope of Complainant's alleged representation.[11]

The answer also elsewhere refers to Mr. Holeton as a 'non-customer', see pages 11 and 12, and asserted as an affirmative defense that Mr. Holeton is "not a customer", see page 14.

DTE's answer also reviewed prior Commission cases addressing DTE's AMI program, and Michigan Court of Appeals orders affirming those decisions, arguing that the Commission and the Court have rejected many of the claims asserted in the complaint. Regarding the state and federal statutes cited in the complaint, DTE denied that its program violates these provisions. DTE also answered that the Commission lacks jurisdiction to consider whether its program violates the Michigan Penal Code or the Consumer Protection Act. DTE also stated that under its' opt out program, meters are read manually once a month, and at no other time.

In summary, DTE asserted that the Commission and the courts have repeatedly rejected similar contentions that AMI meters are unlawful, and rejected attempts to dictate or tamper with DTE's property. DTE asked the Commission to dismiss the complaint, disputing that the Holetons are factually or legally entitled to relief. DTE's answer further identified a list of affirmative defenses including agreement, consent, acquiescence, ratification, course of conduct or performance, promissory estoppel, misrepresentation, release, abandonment, violation of law, statute of limitations, laches, undue delay, failure

[11] See DTE Electric Answer, page 2 at n 2.

to mitigate damages, accord and satisfaction, estoppel, mistake, release, mootness, waiver, settlement, res judicata, collateral estoppel, and law of the case.

C. Staff's Motion

Staff filed a motion on June 16, 2016, seeking to have the complaint dismissed entirely or limited to the question of whether DTE wrongly threatened to shut off service to the Holetons. Staff's motion argued that large portions of Mr. Holeton's complaint raise issues and arguments that have been fully litigated before the Commission in decisions affirmed by the Court of Appeals. Staff cited the Michigan Court of Appeals opinion affirming the Commission's order in Case No. U-17053,[12] arguing that the decision to install smart meters lies solely with the utility, and that the Holetons are limited to choosing between a transmitting AMI meter or a non-transmitting AMI meter, or declining service.

D. DTE's response

On June 22, 2016, DTE filed a response supporting Staff's motion. DTE agreed with Staff that the complaint attempts to relitigate AMI-related issues that should be dismissed. DTE also relied on recent decisions of the Court of Appeals.[13] And DTE attached a letter from an MPSC staff attorney rejecting an AMI-related complaint brought by another customer, in Case No. U-17994, on the basis that it failed to state a prima facie case.[14] DTE quoted the portion of the letter that states that the Commission does not have jurisdiction to enforce the Consumer Protection Act or Michigan Penal Code.

[12] *In re Application of Detroit Edison Co to Implement Opt-Out Program*, unpublished opinion per curiam of the Michigan Court of Appeals, issued February 19, 2015 (Docket Nos. 316728, 316781), *lv den* 499 Mich 868, *reh den* --- Mich ---, 880 NW2d 546 (June 28, 2016).
[13] In addition to *In re Application of Detroit Edison Co to Implement Opt-Out Program*, cited above, DTE cited *The Detroit Edison Company v Stenman*, 311 Mich App 367 (2015), lv den 499 Mich 871 (2016).
[14] See R 792.10441 and 792.10442.

E. Mr. Holeton's response

Mr. Holeton filed a written response on June 24, 2016, opposing summary disposition. He disputed that he wishes to pursue a 4th Amendment claim, and that he does not understand that the meter is DTE's property. He noted that the "remedies requested" portion of his complaint contains citations to Commission rules he believes have been violated. He further stated that he is asserting a due process interest in not having service shut off pending resolution of complaint.

F. Oral argument

At the June 28, 2016 hearing, the parties were given an opportunity for oral argument on Staff's motion. Staff and DTE reiterated their reliance on a series of Commission orders and Court of Appeals decisions affirming that DTE owns the meters used to measure electric consumption, that DTE has the right to replace the analog meters with AMI meters, and that DTE has the right to discontinue service to customers who prevent access to or otherwise tamper with a meter. They also argue that the Commission has approved an opt-out program.

Mr. Holeton argued that his complaint was within the MPSC's jurisdiction, and further stated that he did not intend to pursue claims based on the Fourth Amendment, MCL 750.539d, or the Consumer Protection Act. He emphasized his belief that his whole complaint is about due process.[15] Mr. Holeton asserted that he has a contract resulting from a prior dispute that DTE will not put anything other than an analog meter on his house.[16]

[15] See Tr 8-9, 20.
[16] See Tr 18, 20.

DTE argued that it had not issued a shutoff notice, but only a letter seeking access to replace the AMI meter. DTE also objected to any reference to a contract, arguing that Mr. Holeton had not stated a contractual claim in his complaint. Mr. Holeton, however, believed that by citing R 460.139, and referencing "as originally contracted", he had stated this claim in his complaint.

Following oral argument, the ALJ determined that an evidentiary hearing was necessary to resolve the facts in dispute and took the legal arguments raised by Staff and DTE under advisement.

G. Evidentiary Record

At the evidentiary hearing, five witnesses testified. Mr. Holeton called three witnesses and presented 6 exhibits;[17] DTE called two witnesses and presented 8 exhibits. The record is contained in 126 pages of transcribed testimony and 14 exhibits.

Mr. Holeton called his wife as his first witness.[18] She testified that the Holetons have been married 47 years, and have lived 32 years at their current address. She also testified that Mr. Holeton pays the utility bill. In addition, she testified that he is a journeyman electrician and installed the electric service in their house.[19]

Ms. Holeton testified that in 2010, someone with no identification changed the electric meter, although she told the man she did not want the meter.[20] She testified that she complained to DTE and to the MPSC, and testified that DTE agreed to compromise with her as reflected in a letter written by MPSC staff member Carol Simon, Exhibit CJH-

[17] Mr. Holeton initially marked additional exhibits, but withdrew them when DTE acknowledged that he could proceed as the complainant in this case although he is not the utility's customer of record. See Tr 30-34.
[18] Ms. Holeton's testimony is transcribed at Tr 35-62.
[19] See Tr 36-37.
[20] See Tr 37-40.

8.[21] Ms. Holeton also presented as Exhibit CJH-7 a bill from February 2011 indicating that the meter was changed on January 3, 2011. She testified that she viewed the MPSC staff letter as a "final remedy" for her complaint case, and thought the meter issue was resolved at that point.[22]

Ms. Holeton also testified that she and her husband sent a letter to DTE dated February 14, 2014, indicating that they did not want an AMI meter. This letter she identified as Exhibit CJH-9.[23]

Ms. Holeton described the events of November 20, 2015, testifying that DTE came with an "enormous" amount of trucks, and had security guards going door-to-door.[24] She testified that she felt both humiliated and afraid. She further testified that she has seen smart meters installed and never seen that many trucks. Ms. Holeton also testified that her husband did not refuse DTE access to the meter, but told the DTE employees they could read, inspect the meter, or replace it "with another meter."[25] She objected to comments made by the person she identified as a security guard:

> [T]here were five people on the porch. They were all saying different things. The security guard was very intimidating and humiliating. He was saying go ahead, do it, do it, go back there, put it on, put it on. I felt so afraid in my own home when this happened.[26]

Ms. Holeton testified that her husband tried to the calm situation, and additionally, at the invitation of a DTE employee, went with that employee to see an AMI meter rebooted at a neighboring house.[27] As she explained the events that day, DTE's

[21] See Tr 40-41.
[22] See Tr 46.
[23] See Tr 44-45.
[24] See Tr 47.
[25] See Tr 47-48.
[26] See Tr 48.
[27] See Tr 48.

representative never said there was an issue with being denied access, and Mr. Holeton never told the representative that he could not go into their backyard.[28] She testified that they have always allowed DTE on their property for 40 years.[29]

She identified Exhibit CJH-11, a letter dated February 5, 2015, as a shutoff notice she received. She testified to her understanding that a shutoff is not permitted based on the Commission's order in Case No. U-17053, a key page of which is Exhibit CJH-10. She interprets that order as allowing her to keep the current analog meter until she and her husband decide whether to enroll in the opt-out program.[30] She also testified that the Holetons have been self-reporting meter readings to DTE.

On cross-examination by counsel for DTE, Ms. Holeton again testified that the contract she and her husband rely on is the letter in Exhibit CJH-8, and the shutoff notice that they believe does not comply with Commission rules is Exhibit CJH-11.[31]

Mr. Holeton also called Steve Lindsey as a witness, a friend who visited the Holetons' house on November 20, 2015.[32] Mr. Lindsey testified that on November 20, 2015, he was overwhelmed by the amount of trucks and men on the Holetons' street, which he characterized as "very intimidating."[33] He further testified that a man he understood to be a security guard was not wearing a uniform, and did not appear to have any DTE-specific identification.[34]

[28] See Tr 48-49.
[29] See Tr 49.
[30] See Tr 56-57.
[31] See Tr 61-62.
[32] Mr. Lindsey's testimony is transcribed at Tr 64-67.
[33] See Tr 65.
[34] See Tr 64-66.

The last witness Mr. Holeton called was Mike Dyda, who lives near the Holetons and who came to their house on November 20, 2015. He testified that there were at least three trucks by the Holetons house and more further down the street, perhaps five to seven trucks in the neighborhood.[35]

DTE called two witnesses. Shannon Robinson is an Executive Customer Consultant for DTE. She presented certain company records regarding the Holetons account, Exhibits R-1 to R-7.[36] She testified that DTE records confirm that the Holetons have had service since 1986 at this address, and have had Interruptible Air Conditioning (IAC) service, with a separate meter, since the end of 2003. Referencing Exhibit R-2, she testified that the Holetons' general residential service meter has been in place since 1989, while the IAC meter was placed in service on January 3, 2011. She testified that the meter DTE replaced in 2011 was the IAC meter.[37]

Ms. Robinson testified that DTE's records included in Exhibits R-3 and R4 reflect a "field event to install" for November 20, 2015, and reflect that an "AMI letter" was sent before that on October 27, 2015. She testified that the records also contain notes stating that "customer refused AMI meter" and "gave customer a card to call and make an appointment to install opt out meter."[38] DTE's Exhibit R-5 is a copy of the same letter the Holetons presented as Exhibit CJH-11.

[35] Mr. Dyda's testimony is transcribed at Tr 67-69.
[36] Ms. Robinson's testimony is transcribed at Tr 72-90.
[37] See Tr 79.
[38] See Tr 77-78.

On cross-examination by Mr. Holeton, Ms. Robinson acknowledged that she did not know how the meter came to be replaced in 2011. She also testified that DTE has no record that the customer at the Holetons' address is not required to have an AMI meter. Finally, referring to the photo of a meter included in Exhibit R-7, she acknowledged that DTE's files contain other such meter readings from the Holetons, but that she had not brought them with her.

DTE also called as a witness Robert Sitkauskas, General Manager of the AMI program for DTE.[39] He acknowledged that he was not in the Holetons' neighborhood on November 20, 2015, but testified that DTE does send multiple trucks to a neighborhood, planning to install 40-50 meters per day per installer. He also testified that he was not aware of the letter from Ms. Simon, Exhibit CJH-8. Like Ms. Robinson, he testified that DTE records reflect that the meter that was changed in 2011 was the IAC meter.[40] Mr. Sitkauskas also testified that he does not consider Exhibit CJH-11/Exhibit R-5 to be a shutoff notice. He presented Exhibit R-8 as an example of the shutoff notice DTE would send to a customer with a locking device on their meter.[41]

On cross-examination, Mr. Sitkauskas testified that the AMI program was not in Shelby five years ago. He also testified that although DTE does not always send security guards when meters are replaced, the company does have situations when it sends security. Nonetheless, he emphasized that he was not contending there was any anticipation of problems at the Holetons' house. He testified that security guards are sent

[39] Mr. Sitkauskas's testimony is transcribed at Tr 90-113.
[40] See Tr 95-96.
[41] See Tr 96-97.

on routes, not to individual homes, and further testified that he was aware of nothing negative about Mr. Holeton and his family.[42]

Referencing the sample notice in Exhibit R-8, he also testified that there is a period of time in which a customer can respond to the situation, even after a shutoff notice is issued. He testified that DTE will make every effort to work with every customer to install an AMI or an AMI opt-out meter.[43]

H. Oral Argument

The parties declined to file written briefs, but were given the opportunity to present additional oral argument. Mr. Holeton argued that the Holetons have a contract with DTE, citing R 460.139(i), which acknowledges settlements, and Exhibit CJH-8. He argued that the Holetons are seeking the same resolution of their complaint as they reached in 2010 and 2011, "staying with the contract". He further argued that they would continue to self-read their meter. He also argued that the Holetons are not required to accept an AMI meter at all, because there is no time limit on when they must join the opt-out program.

Referencing its position on summary disposition, DTE argues that there are no issues requiring resolution in this proceeding. Regarding Exhibit CJH-8, DTE argues that this is not a contract, that the meter issue identified arose before the AMI opt-out program began in 2013, and nothing in the letter indicates an ongoing obligation on DTE's part. DTE further reiterates that it is well established that the meter belongs to the utility. Citing R 460.115, DTE also argues that the Holetons' proposed settlement of this case is not viable because DTE is entitled to read meters itself. Noting that Mr. Holeton did not

[42] See Tr 101.
[43] See Tr 109.

address the shutoff notice issue in his closing argument, DTE also argues that it did not send a shutoff notice to the Holetons. Staff relied on its earlier arguments in connection with its motion for summary disposition.

III.

DISCUSSION

Based on the evidentiary record and the arguments of the parties, the following issues are addressed in this discussion section. First, to resolve any remaining confusion, the complainant's standing to bring this complaint is addressed in section A. Second, the Holetons presented two separate reasons why they believe they are legally entitled to retain an analog meter. The principal reason is the prior settlement of their 2010 complaint, which is discussed in section B below. The other reason is their interpretation of the Commission's September 29, 2013 order in Case No. U-17053, which is discussed in section C below.

Whether DTE issued a shutoff notice that failed to conform to the applicable legal requirements is addressed in section D. Next, whether DTE wrongly threatened to shut off service to the Holetons by erroneously claiming that the Holetons denied the utility access to its meter or created a safety concern is discussed in sections E and F. The Holetons' objections to the manner of DTE's installation of meters in their neighborhood, including the use of trucks and security guards, is discussed in section G.

A. Standing

The record shows that the Holetons have resided at their current address for over 30 years. Ms. Holeton also testified that Mr. Holeton pays the utility bill. While Ms. Holeton is DTE's customer of record, there is no dispute that Mr. Holeton has standing

to bring a complaint under MCL 460.58. This statutory provision states in pertinent part: "Upon complaint in writing that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, *to the prejudice of the complainant*, the commission shall proceed to investigate the matter." Although DTE's answer and argument notes that Mr. Holeton is not DTE's "customer of record," DTE referenced the affidavit from Ms. Holeton attached to Mr. Holeton's complaint in stating that it did not object to Mr. Holeton acting in a representative capacity. Based on the record evidence indicating that Mr. Holeton resides with his wife and pays the utility bills, this PFD also finds that he has standing to raise issues regarding the utility's compliance with the Commission's rules governing a shutoff of service to his residence.

B. Prior settlement

A primary basis for the Holetons' belief that they do not need to allow DTE to install an AMI meter or the alternative non-transmitting AMI opt-out meter is the resolution of a complaint they made to DTE and to the MPSC in 2011. As discussed above, Ms. Holeton testified that she complained about the installation of a digital meter at her house in 2010, which DTE subsequently replaced with an analog meter. She testified that she believed DTE's resolution of this complaint, reflected in a letter from an MPSC staff member, constituted a contract and "final remedy" for her concerns. Although not reflected in DTE's records, it is clear that in 2011, the Holetons objected to DTE's installation of a digital meter, and DTE agreed to replace the meter. It is clear from DTE's records and Mr. Sitkauskas's testimony that the meter at issue in 2011 was the Holetons' IAC meter, and the Holetons do not dispute this.

The letter the Holetons rely on to document the agreement is Exhibit CJH-8, a February 22, 2011 letter from an MPSC employee at the time. This letter states in key part:

> The MPSC staff has contacted Detroit Edison (DTE) on your behalf. A DTE utility representative explained that DTE replaced your current meter with the old style meter. DTE also offered to come on out and take measurements of the electromagnetic field (EMF) around and within your home, which you declined. Should you have additional questions or concerns about your complaint, please contact your utility company directly. This matter is now considered resolved.

DTE argues that the agreement is not a contract—clearly, there is no writing signed by DTE. And DTE argues that nothing in the 2011 letter creates an ongoing obligation on the utility's part.

After reviewing the letter and the testimony about the surrounding circumstances, it is reasonable to conclude that the letter memorializes an informal settlement agreement or complaint resolution between the Holetons and DTE, in which DTE agreed to replace the digital meter that was the subject of the complaint and to test the electromagnetic frequency levels at the Holetons' house at their option, and the Holetons agreed to withdraw or not pursue their complaint with the MPSC. The difficult question is not whether DTE made commitments to the Holetons at that time to replace their digital IAC meter, since the meter had already been replaced by the time the letter was written, but whether DTE also made a specific commitment to refrain from installing such a meter for any future time period.

Ms. Holeton acknowledged that she relied on the staff letter as the basis for the resolution of her complaint, and did not identify any express representations from DTE. Thus, there is no basis on this record to conclude that DTE committed to retain analog

meters for the Holetons for any specific time period. As typical for agreements with no stated termination date, the informal settlement agreement between the Holetons and DTE, as memorialized by the staff letter, should be construed as terminable at will. That is, although DTE made a commitment to replace the meter in 2011, it was not legally bound to retain that meter at the Holetons' house for any definite period of time.[44]

There are two other technical reasons to reject a claim that DTE made a legally-binding long-term commitment. First, if the agreement were interpreted as an agreement by DTE to refrain from replacing the Holetons meters with a digital meter for a period of years, a writing signed by DTE, as the party to be charged with performing that agreement, would generally be required to enforce the agreement.[45] Another second concern that argues against finding that DTE made a long-term commitment to the Holetons is that as a regulated utility, there are limits on DTE's ability to make such a commitment. As an example, should the Commission decide that DTE is required to charge a higher rate for electricity use during peak hours of the day, DTE would clearly be required to meter the use accordingly. As DTE argues, the Commission had not approved the opt-out program at the time of the complaint resolution.

Thus, this PFD finds that although the Holetons sincerely believed they could rely on the resolution of this complaint as justification for refusing a DTE AMI meter, the evidence does not establish an express or a legally-binding commitment by DTE to refrain from installing a digital meter.

[44] See, e.g. *Lichnovsky v Ziebart International Corporation*, 414 Mich 228, 240-241 (1982) ("The rule is . . . that where the parties have not agreed upon the term, duration or manner of termination . . . it is generally deemed to be terminable at the will of either party because they have not agreed otherwise.")
[45] See MCL 566.132(1) and *Schipani v Ford Motor Co*, 102 Mich App 606 (1981).

C. Opt-Out Option per Case No. U-17053

The second reason the Holetons believe they do not have to allow DTE to replace the meter is their understanding that the Commission's September 29, 2013 order in Case No. U-17053 provides an indefinite time period for them to consider whether to choose the opt-out tariff option, and allows them to retain their analog meter while they consider. Ms. Holeton testified to the page of the Commission's order that they rely on, which is Exhibit CJH-10, or page 3 of that order, reviewing Staff's argument that a 30-day deadline to accept a non-transmitting opt-out meter is not permitted by the tariff approved in the Commission's May 15, 2013 order in the same docket. In key part, the cited page states:

> [T]he Staff argues that . . . the Commission should issue an order instructing the utility that the 30-day deadline is not permitted by the tariff approved in that order. The Staff notes that the Commission did not provide a cut-off date for when a customer must inform DTE Electric that he or she wishes to have their meter rendered non-transmitting.[46]

While the Commission did accept Staff's recommendation in that case, and ordered DTE to confine its communications to the dictates of the May 15, 2013 order and the approved tariff, the Commission did not alter its earlier recognition, also affirmed by the Court of Appeals, that DTE has the right to replace its analog meters with AMI meters, either the transmitting or non-transmitting AMI meters. The Commission did not prohibit DTE from accessing or replacing an analog meter until a customer decides whether to participate in the opt-out program. Instead, even after DTE installs an AMI meter, at any time, the opt-out tariff allows a customer to choose a non-transmitting AMI meter. Thus, this PFD finds that the Commission's order in Case No. U-17053 does not prohibit DTE from replacing the meter at the Holetons' house.

[46] See September 29, 2013 order, Case No. U-17503, page 3.

D. Shutoff notice

Turning to the question whether DTE violated R 460.139 by sending a shutoff notice that does not contain the required information, the issue in dispute is whether the February 5, 2016 letter DTE sent the Holetons is technically a shutoff notice. As shown in Exhibit CJH-11/Exhibit R-5, the letter is dated February 5, 2016, and addressed to Ms. Holeton. The letter states:

> This letter is to inform you that we are replacing DTE's electric meters in homes and businesses in your area. These meters are being replaced at no cost to you and will only take a few minutes to install.
>
> Our records indicate that a DTE field representative has attempted to gain access to our metering equipment to replace the meter at the above referenced site address. However, the field representative reported the meter replacement could not be completed because access to our metering equipment was refused.
>
> The terms under which you take service authorizes (sic) DTE representatives to access your premises for a number of reasons, including but not limited to installing, inspecting, maintaining, reading and/or replacing its meters. Pursuant to Michigan Public Service Commission (MPSC) **Rule 460.137** a utility may shut off or terminate service if the customer has refused to arrange access at reasonable times for the purpose of inspection, meter reading maintenance, or replacement of equipment that is installed upon the premises, or for the removal of a meter.
>
> The Michigan Public Service Commission has approved an Opt-Out Program for residential customers. Customers enrolled in the Opt-Out Program will have a non-transmitting (radio off), digital meter installed and the following fees applied to their account:
>
> - $67.20 AMI Opt-Out Initial Fee
> - $9.80 AMI Opt-Out Monthly Charge
>
> It is imperative that we gain access to our metering equipment and we need your cooperation. Please contact us at 1.800.477.4747 no later than **30 days from the date of the letter** to arrange access to our metering equipment. If you would like to enroll in the Opt-Out program, please inform the representative when you contact us. Whether you choose to enroll in the Opt-Out Program or not, we still need access to our metering equipment.

Thank you in advance for your immediate response and cooperation.

The letter was signed “Advanced Metering Team”.

As recited in the letter, R 460.137 permits a utility to shut off service to a residential customer, if, among other reasons, “[t]he customer has refused to arrange access at reasonable times for the purpose of inspection, meter reading, maintenance, or replacement of equipment that is installed upon the premises, or for the removal of a meter.” R 460.138 requires that a utility send a shutoff notice, 10-30 days before the proposed shutoff date, if the utility intends to shut off service pursuant to R 460.141 or R 460.142, which contain additional requirements for involuntary shutoffs. R 460.139 prescribes the form of that notice, and requires among other information, “that the customer has the right to file a complaint disputing the claim of the utility before the proposed date of the shutoff of service,” “that the utility will not shut off service pending the resolution of a complaint that is filed with the utility or the commission in accordance with these rules,” and “the telephone number and address of the utility where the customer may make inquiry, enter into a settlement agreement, or file a complaint.”[47] Although Exhibit CJH-11/Exhibit R-5 does contain a telephone number and address for the utility, it does not inform the recipient of the right to file a complaint or state that service will not be shut off pending the resolution of a complaint. The Holetons consider this letter to be a shutoff notice, while DTE does not.[48]

After carefully reviewing the language of the letter, although the phrase “shut off” appears in the letter, there are no direct statements in the letter indicating that the utility intended to shut off service to the Holetons if they did not respond within the 30-day time

[47] See R 460.139 (e), (h), and (i).
[48] See Ms. Holeton’s testimony at Tr 53-54, and Mr. Sitkauskas’s testimony at Tr 96.

period. The letter indicates in the opening that it is informational. The sentence containing the 30-day time period begins with the word "please." In contrast, DTE presented an example of the notice it does send when it intends to shut off service because a customer has placed a lock on a service meter. Exhibit R-8 has the following language:

> Pursuant to Michigan Public Service Commission (MSPC) **Rule 460.136**, a utility may shut off service temporarily for reasons of health or safety. For these reasons, your electric service will be disconnected without further notice if you do not remove the locking device and contact us immediately so that we can proceed with the installation of the advanced meter. If your service is interrupted, you will be required to pay a reconnect fee to have your service restored.

As noted above, Mr. Sitkauskas also testified that even after a notice such as this is sent, a customer still has time to take action to avoid having service shut off. The distinction between Exhibit R-8 and Exhibit CJH-11/Exhibit R-5 is that Exhibit R-8 makes clear that no additional notice will be provided, and states "service will be disconnected." While neither of these documents conform fully to the requirements of R 460.139, DTE did not violate R 460.139 in sending this Exhibit CJH-11/Exhibit R-5 letter because it was not intended to notify the Holetons that DTE intended to shut off their service, but to notify the Holetons that DTE needed access to their property to change the meter.

E. R 460.137(e)

The Holetons also object to the statement in the February 5, 2016 letter (Exhibit CJH-11/ Exhibit R-5) and in DTE's records to the effect that the Holetons refused to allow DTE access to the meter. As quoted above, the letter cites R 460.137, which identifies as one of the reasons a utility may shut off service:

> (e) The customer has refused to arrange access at reasonable times for the purpose of inspection, meter reading, maintenance, or replacement of equipment that is installed upon the premises, or for the removal of a meter.

The complaint asserts that the Holetons did not refuse access to DTE for any purpose other than installing an AMI meter:

> I told the representative he was welcome to read my meter, inspect, service and repair my meter and replace my meter with [an] analog meter if he chooses but I believe it is unlawful to install a data collection device on my home without my permission. . . He did not demand access to force the issue and I did not deny him access to my meters for billing, service or safety reasons or replacement of my meter if necessary.[49]

Ms. Holeton similarly testified that the DTE representative at the Holetons' house on November 20, 2015, never said there was an issue with being denied access or claimed the Holetons were being unreasonable.[50] She testified that Mr. Holeton "never told them they could not go back and . . . never told them they couldn't have access."[51] And she testified that the Holetons have always allowed DTE access to their property.[52]

While the Holetons argue they did not technically refuse DTE access to replace the meter on November 20, 2015, they did make clear to DTE both on November 20, 2015, and again at the June 28, 2016 hearing, that they object to having an AMI meter. If the Holetons did not intend to refuse DTE access to replace the meter on November 20, 2015, however, DTE has given them the opportunity to make arrangements for the meter to be replaced by sending them the letter in Exhibit CJH-1/Exhibit R-5. Since DTE had not issued a shutoff notice to the Holetons as of the hearing, and since this case should resolve the legal issues underlying the Holetons'

[49] See complaint, page 2, paragraph 3a. Also see page 3, paragraph 4.
[50] See Tr 48-49.
[51] See Tr 49.
[52] See Tr 49.

claims that they are not required to allow DTE to install either an AMI meter or an opt-out meter, there is no further issue to resolve on this point.

F. R 460.136 and R 460.137(g)

Likewise, Mr. Holeton's complaint takes issue with the potential shutoff of the Holetons' service under R 460.137(g) and/or R 460.136. R 460137(g) identifies as another reason for a shutoff: "The customer has violated any rules of the utility approved by the commission so as to adversely affect the safety of the customer or other persons or the integrity of the utility system." R 460.136 provides:

> Notwithstanding any other provision of these rules, a utility may shut off service temporarily for reasons of health or safety or in a state or national emergency. When a utility shuts off service for reasons of health or safety, the utility shall leave a notice at the premises in accordance with the provisions of R 460.139(a), (b), and (i).

DTE considers that a safety hazard is created when customers place locks on their meters in an effort to prevent the meters from being replaced with AMI meters, while Mr. Holeton disputes this characterization. Mr. Sitkauskas testified that the locks present a safety concern.[53] Mr. Holeton's assertion that the locks do not present a safety issue because they can be removed with bolt cutters that should be standard equipment does not refute or impeach Mr. Sitkauskas's testimony, because in a true emergency, any additional steps to address the emergency may properly be characterized as a safety issue. Thus, this PFD accepts Mr. Sitkauskas's testimony that the locks present a safety issue.

[53] See Tr 107.

Whether the locks present a safety issue of sufficient urgency to trigger the no-notice provision of R 460.136 is a question that was not addressed in this case. DTE, however, does not appear to view the safety concern as requiring immediate action, since it sends the letter in Exhibit R-8 under such circumstances, as Mr. Sitkauskas testified. As quoted above, the notice itself indicates that customers are subject to having their service shut off without further notice. In cross-examining Mr. Sitkauskas, Mr. Holeton asked whether a customer receiving this notice would be able to contact the utility to avoid a shutoff. Mr. Sitkauskas testified that the company intends to work with its customers to avoid shutoff.[54] Rule R 460.130 also requires a utility to have qualified personnel available "at all times to receive and respond to customer contacts regarding any shutoff of service."

As discussed above, although the Holetons sincerely believed they were not legally obligated to allow DTE to install an AMI or opt-out AMI meter at their house, this PFD concludes that the Holetons do not have either a contractual commitment from DTE to retain use of analog meters at their house, or the right to retain an analog meter indefinitely while they consider whether to enroll in the opt-out program. Since DTE has not issued a shutoff notice to the Holetons, and since this case should resolve the legal issues underlying the Holetons' claims that they are not required to allow DTE to install either an AMI meter or an opt-out meter, there is no further issue to resolve on this point.

[54] See Tr 106-109.

G. DTE personnel

The Holetons also objected to the numerous DTE personnel, including a number of trucks and a security guard, in the Holetons' neighborhood on November 20, 2015. Ms. Holeton and Mr. Lindsey used the word intimidating when discussing the utility personnel. As discussed above, Mr. Sitkauskas confirmed that many trucks are used at part of the installation in a neighborhood, with goals of 40 to 50 meters changed per day per installer. He also confirmed that security guards are sometimes sent on routes. The Commission does not have rules that limit the number of or use of security guards by DTE. While the presence of a security guard may have seemed intimidating to some, the record confirms that neither Mr. Holeton nor Ms. Holeton were intimidated into taking actions against their wishes. Instead, they did not allow an AMI meter to be installed at their house. Mr. Holeton also accompanied DTE personnel to a neighbor's house to watch an AMI meter reboot, and he brought his complaint to the Commission, where it is being resolved in accordance with the Commission's billing rules and the applicable procedural rules.

Mr. Holeton's complaint asks for relief in the form of a Commission order directing that DTE employees have identification. Mr. Sitkauskas testified that employees are required to carry identification, and his testimony was not contradicted. There are no Commission rules addressing the company's use of security guards. On the basis that DTE employees did not intimidate the complainant or his wife into taking any action against their wishes, and on the basis that there is no evidence that DTE employees failed to present identification when requested, this PFD finds that no Commission action is warranted on this issue.

IV.

CONCLUSION

For the reasons explained above, this PFD recommends that the Commission make the following findings and adopt the following conclusions:

1. Find that DTE did not make an express commitment to refrain from installing digital meters at the Holetons residence;

2. Find that DTE did not issue a shutoff notice to the Holetons;

3. Find that DTE has given the Holetons the opportunity to provide access to the utility to replace the meter at the Holetons' house by sending the letter in Exhibit CJH-11/Exhibit R-5, so that even if the Holetons did not intend to deny the utility access to their property to replace the meter, they have not been injured by the utility's initial conclusion that access was denied.

4. Find that DTE's use of a large number of trucks and security guards while installing AMI meters in the Holetons' neighborhood did not intimidate the Holetons by causing them to take an action against their wishes.

5. Conclude that DTE did not make a binding contractual commitment to refrain from installing digital meters at the Holetons house.

6. Conclude that the Commission's orders in Case No. U-17053 do not give customers an indefinite time period to retain an analog meter while they consider whether to join the approved opt-out program.

7. Conclude that DTE did not violate the rules governing shutoff notices in its communications with the Holetons.

8. Conclude that DTE's use of a large number of trucks and security guards in the Holetons' neighborhood did not cause an actionable injury to the Holetons.

9. Conclude that the complaint should be dismissed.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Sharon L. Feldman

Sharon L. Feldman
Administrative Law Judge

Issued and Served: 9/16/16
vmc